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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1807

THE TEXAS HIGHWAY DEPARTMENT, ET AL., *Petitioners*,

v.

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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June 1971

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This case was previously before the Court this term on a petition for writ of certiorari, before judgment, sought by individual members of the San Antonio Conservation Society, now the respondents. Certiorari was denied over the dissents of Justices Black, Douglas and Brennan. 400 U.S. 968 (1970). Mr. Justice Black and Mr. Justice Douglas filed dissenting opinions, each joined by the other, and by Mr. Justice Brennan. Although the relevant facts are set forth in those dissenting opinions, we include a brief recapitulation for the convenience of the Court.

Respondents brought this action seeking injunctive relief against the Secretary of Transportation and the

Texas Highway Department to prevent the construction of a 9.6 mile federal-aid highway through the Brackenridge-Olmos Basin parklands located in San Antonio. The highway will connect at either end with federal interstate highways (I-410 and I-35). As the highway was originally planned, it would be a six-to-eight lane elevated expressway requiring the taking of 250 acres of public parklands. Respondents challenged this highway on the ground that the Secretary of Transportation failed to comply with federal statutes specifically designed to protect parklands such as those involved here. 49 U.S.C. (Supp. V) § 1653(f), 23 U.S.C. (Supp. V) § 138. Respondents also claimed that the state officials failed to comply with a number of state statutes, including Article 5421q of the Revised Civil Statutes of Texas which contains substantially the same requirements as sections 1653(f) and 138. (Article 5421q is set forth in Appendix A hereto).

On November 13, 1970, the district court granted petitioners' motion for summary judgment with respect to two segments of the highway at either end of the park while retaining jurisdiction until the Secretary decided where to locate the "middle segment". A notice of appeal was filed in the Court of Appeals for the Fifth Circuit and a petition for certiorari, before judgment, was filed in this Court. This Court then denied certiorari, 400 U.S. 968 (1970), and, over the dissents of four Justices, vacated a stay it had previously entered. 400 U.S. 961 (1970).

After the denial of certiorari, this Court heard argument in, and decided, *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971), a case similar to this one in many respects. On the basis of that decision, respondents applied to the Court of Appeals for

the Fifth Circuit, where their appeal from the district court order was still pending, for a stay. Citing *Citizens to Preserve Overton Park,* the court of appeals on May 27, 1971 granted a stay that prevented, pending appeal, any further work on the highway. On application by the Texas Highway Department the court of appeals suspended its stay to allow the Highway Department to file a petition for certiorari to review the order granting the stay. The Fifth Circuit's stay remains suspended until this Court acts on the petition for certiorari.[1]

Petitioners seek certiorari on two grounds. First, they seek a writ of certiorari before judgment to review the order of the district court granting them and the federal government summary judgment and permitting them to begin construction on the two "end segments" of this highway. It was this very same order which respondents previously sought to have this Court review. At that time, the petitioners, and the federal government, vigorously opposed certiorari and this Court denied the petition. Having previously opposed review of that order, it does not now befit the petitioners to seek the extraordinary remedy of certiorari before judgment to review the district court order granting precisely the relief they sought.

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[1] This Court's earlier orders denying respondents' petition for certiorari, before judgment, and vacating the stay previously granted do not control the question of whether the Fifth Circuit abused its discretion in granting the stay. It is likely that a factor in the majority's decision to deny respondents' petition and to vacate the stay was that the petition was for certiorari before judgment and that respondents would still have the right of plenary review in the court of appeals. Furthermore, the court of appeals considered respondents' application for stay in light of this Court's subsequent decision in *Overton Park* and granted the stay on that basis.

Petitioners also seek certiorari to review the order of the Fifth Circuit staying, pending appeal, any further work on this highway. This Court has shown a well-founded reluctance to review interlocutory orders of lower courts. *E.g., American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U.S. 327 (1967). There is no cause to depart from that practice here, particularly since review is sought of a stay order which is committed to the discretion of the lower court and will not be set aside "unless the discretion was improvidently exercised." *Alabama* v. *United States*, 279 U.S. 229, 231 (1929).

The grounds asserted by petitioners not only lack merit but are disingenuous. Petitioners assert that the court of appeals had no jurisdiction to restrain them from constructing this federal-aid highway because the state is committed to construct it entirely with state money as a state highway. The fact is, as shown conclusively by the record in this case, that this highway is now a federal-aid highway and has been since at least 1961. The federal government is committed to reimburse the state for 50 percent of the cost of construction now under way on the "end segments". Once the state and the federal government decide on the location of the "middle segment", the federal government will reimburse the state for 50 percent of the construction cost of that segment.[2]

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[2] The Secretary of Transportation is currently studying various alternatives for the "middle segment". Once he reaches a decision on the "middle segment", the state must concur in his judgment to be eligible for federal funds. If the state does not agree to construct this "middle segment" on the location chosen by the Secretary, it forfeits federal financing for the entire route. (Second Shane Affidavit.)

The record in this case reflects a decade of close cooperation between the state and federal governments on this highway project. In 1961 petitioners sought and gained approval from the federal government for purposes of right-of-way acquisition; in 1963 they sought and gained approval from the federal government for a public hearing; in May 1968 the state sought approval from the Secretary of Transportation for construction of the entire highway. In September 1968 Secretary of Transportation Boyd refused to grant that approval unless four significant design changes were incorporated. The state refused to accept the Secretary's conditions and negotiations between the state and federal governments continued until August 4, 1970. At that time an agreement was reached on the construction of the two "end segments". Obviously, if this were simply a state highway to be constructed with state funds, the Texas Highway Department would not have sat idle from May 1968 until August 1970 waiting for approval from the Secretary of Transportation. The fact is that the state did not begin work on the highway during this period because it did not wish to construct it as a state highway without federal money.

Finally, the Court will note that petitioners do not contend that they are presently constructing this highway as a state highway. Rather they assert that they are committed to construct it as a state highway if at some point in the future the federal government should decide not to participate. If and when the federal government decides to withdraw from this federal-aid project, the issues argued by petitioners might arise. However, where, as here, the federal government is still participating, those issues are premature, if not hypothetical.

The issues presented by petitioners were not raised in this litigation until after the Fifth Circuit entered its order on May 27 halting construction of the highway.[3] At that point petitioners, obviously searching for a way to avoid the court's order, hit upon the argument that the federal court would be without jurisdiction over them if they were willing to construct this highway without the use of federal funds. That contention was not raised by petitioners in their answer to the complaint, nor in their motion for summary judgment in the district court, nor in their response to the petition for certiorari, before judgment, filed earlier this term in this Court. Thus it is not surprising that in support of the petition for certiorari the petitioners rely not upon the record in this case but upon four affidavits filed in the Fifth Circuit *after* the entry of its stay order on May 27 (App. L to Petition for Cert.) and a further affidavit and order of the Texas Highway Commission (Apps. M and N) dated after the Fifth Circuit's order and not filed in any of the courts below. Those documents are "too-late formulations" obviously obtained by petitioners' counsel in an effort to assert a new-found theory to avoid the court of appeals' order. Compare *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 at 422 (1971) (Separate Opinion of Mr. Justice Black).

A holding that a state could avoid the requirements of sections 1653(f) and 138 by converting, at the last minute and for the sole purpose of avoiding those statutes, a federal-aid highway into a state highway would create a giant loophole in the protection Congress

[3] This, in itself, is a sufficient ground for this Court to decline review. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Ass'n*, 360 U.S. 334, 342 (1958), n. 7.

sought to give to parklands and recreation areas. As the affidavit of the State Highway Engineer filed in this Court (App. N to Petition for Cert.) candidly concedes, the State of Texas, if it decides to build this road with state funds, will not forfeit any federal-aid money.[4] Instead, the federal contributions now obligated for this highway will be used to finance another highway in Texas which is currently planned as a state route. The state will end up with the same amount of federal money, and the same number of miles of highways. Thus, merely by a change in bookkeeping, and the shifting of funds from one project to another, the state would avoid these important federal statutes designed to protect parklands and recreation areas.

Thus there is no issue here of the power of the court of appeals to enjoin the petitioners from constructing this federal-aid highway and none was presented below. Accordingly, the petition should be denied. Even if that question were present here, there are two additional, independent grounds to support the court of appeals' jurisdiction to grant the stay against the petitioners. First, since this highway connects at either end with interstate highways, financed by federal funds, even if it were financed completely with state funds it would be subject to the federal statutes since it is a part of the network of federal-aid highways. The second ground is that respondents have stated a claim against petitioners under Article 5421q of the Revised Civil Statutes of Texas, which is substantially

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[4] The federal funds for federal-aid highways other than interstate highways are allocated to the states according to a fixed formula, and thus if federal funds are not used for one particular highway project they remain available for other projects within the state. 23 U.S.C. § 104(b)(1)-(3); (c).

the same as sections 1653(f) and 138; and the court of appeals has pendant jurisdiction to decide that claim and to enter an order enjoining the petitioners from constructing the highway pending disposition of that claim. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 721-729 (1966).

Finally, there is no need to review whether the court of appeals abused its discretion in granting a stay to halt construction. The court obviously determined that there is a substantial likelihood that respondents will prevail on the merits of the appeal and will be entitled to permanent injunctive relief. Thus it is better to stop construction now than for the state to continue to spend substantial amounts of money and to damage and destroy parklands during the pendancy of the appeal. Halting construction now rather than later may actually save petitioners money, time, and effort, not to speak of saving the parklands involved.[5] Thus there is no cause to grant the petition to review the court of appeals' exercise of its discretion in granting the stay.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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June 1971

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[5] Petitioners assert that it will be unsafe to halt construction pending appeal. Respondents have not opposed whatever maintenance work may be necessary to eliminate any safety hazards created by the court of appeals' order.

APPENDIX A

Vernon's Annotated Texas Statutes

Art. 5421q. Taking park, recreational, etc., land for other public use; notice; hearing

Section 1. No department, agency, political subdivision, county or municipality of this state shall approve any program or project that requires the use or taking of any public land designated and utilized prior to the arrangement of such program or project as a park, recreation area, scientific area, wildlife refuge, or historic site, unless such department, agency, political subdivision, county or municipality, acting through its duly authorized governing body or officer, shall determine, after notice and public hearing as required herein, that (1) there is no feasible and prudent alternative to the use or taking of such land, and (2) such program or project includes all reasonable planning to minimize harm to such land, as a park, recreation area, scientific area, wildlife refuge, or historic site, resulting from such use or taking; clearly enunciated local preferences shall be considered, and the provisons of the Act do not constitute a mandatory prohibition against the use of such area if the findings are made that justify the approval of a program or project.

Section 2. When any program or project requires notice and a public hearing before approval, notice thereof shall be given in writing to the person, organization, department or agency that has supervision of the land proposed to be used or taken. The notice shall state clearly the proposed program or project, and the date and place for the public hearing, and the notice be given at least 30 days before the date for the public hearing. Notice shall also be given to the public by publishing a notice similar to that specified in this section once a week for three consecutive weeks. The last days of publication shall not be less than one week or more than two weeks before the date of the hearing. The notice shall be published in a newspaper of general

circulation, which paper must be published at least six days a week in the county where the land proposed to be used or taken is situated. If there be no such newspaper, then the notice shall be published in such a newspaper that is published in any county adjoining the county where the land is situated; and, if there be no such newspaper published in any adjoining county, then in such a newspaper published in the nearest county to the county where the land is situated. Provided, that if there be no such daily newspaper published therein, said notice shall be published in any newspaper of general circulation published in the political subdivision affected. And if no newspaper be published in such political subdivision, notice shall be published in a newspaper published in the nearest political subdivision thereto.

Section 3. Judicial review of the validity or invalidity of the approval or disapproval of a program or project is barred unless the petition for review is filed within thirty days after the approval or disapproval is announced.

Acts 1969, 61st Leg., p. 838, ch. 276, emerg. eff. May 22, 1969.